United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1284

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

THOMAS JAMES SMITH,
Defendant-Appellant.

BRIEF FOR APPELLANT PURSUANT TO ANDERS *v.* CALIFORNIA

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JOHN T. DONOVAN, ESQ.,
Appointed Counsel,
Attorney for Appellant,
Thomas James Smith,
330 Powers Building,
Rochester, New York 14614.

To: GERALD J. HOULIHAN,
United States Attorney,
100 State Street,
Rochester, New York 14614.

THOMAS JAMES SMITH,
Federal Correctional Institute,
Sandstone, Minnesota 55072.

BATAVIA TIMES, APPELLATE COURT PRINTERS
JOHN S. BROWN, REPRESENTATIVE
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UNITED STATES COURT OF APPEALS
FILED
JAN 23 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

UNITED STATES OF AMERICA Plaintiff-Appellee, -against- THOMAS JAMES SMITH Defendant-Appellant	Docket No. 77-1284

BRIEF FOR APPELLANT PURSUANT TO ANDERS V. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether this case presents any non-frivolous issues to be raised on appeal for review by this Court.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Western District of New York (The Honorable Harold P. Burke) rendered on May 25, 1977, Convicting appellant Thomas James Smith of transporting a motor vehicle in interstate commerce that he knew to be stolen in violation of Title 18, United States Code, Section 2312.

JOHN T. DONOVAN, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged with transporting in interstate commerce a motorvehicle, that was a 1974 Mercury Cougar, Vehicle Identification Number 4A93H556559, from the State of Pennsylvania to Rochester, New York, in the Western District of New York on October 11, 1974. In Count II of the indictment defendant was charged with disposing of disposing of the same motor vehicle which was a part of and constituted interstate commerce, and he then knew the motor vehicle to be stolen.

Plaintiff pled guilty to both counts and then jumped bail while awaiting sentence. On March 17, 1977 the undersigned was appointed counsel after the defendant had been rearrested. The undersigned successfully moved to have the plea withdrawn. Thereafter decided to plea to the first count of the indictment in full satisfaction of the full indictment

STATEMENT OF POSSIBLE ISSUES ON APPEAL

There are no arguable questions for an appeal.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues to be raised on appeal for this Court's review: accordingly, an order should be entered relieving the appointed counsel as counsel for the appellant.

Respectfully submitted,

JOHN T. DONOVAN, ESQ.,
Attorney for Appellant
Thomas James Smith
330 Powers Building
Rochester, New York 14614

T 1080—Notice of motion, U.S. Court of Appeals: Second Circuit: 6-77

PTD. BY JULIUS BLUMBERG, INC. NYC 10013

Second Circuit Rule 27(a) governing use of this form is reprinted on reverse.
Note requirement that lower court opinion or agency decision be attached.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

77	1284

Docket Number

THE UNITED STATES OF AMERICA
-vs-
THOMAS JAMES SMITH

Use short title

NOTICE OF MOTION
state type of motion

for Atttorney of record to be relieved as counsel

MOTION BY: JOHN T. DONOVAN
(Name and telephone number of attorney in charge)
716-232-1474

OPPOSING COUNSEL: GERALD J. HOULIHAN
(Name and telephone number of attorney in charge)
716-263-6760

Has opposing counsel consented? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date: December 23, 1977
(See Second Circuit Rule 27(b))
Date of argument of appeal, if scheduled:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below?
(See F.R.A.P. Rule 8.) ☐ Yes ☐ No
Would expedited appeal eliminate need for this motion?
☐ Yes ☐ No
If no, explain why not:

Judge or agency whose order is being appealed: Hon. Harold P. Burke

Brief statement of the relief requested: Counsel for the appellant requests to be relieved on the ground that the appeal is frivilous.

Previous requests for similar relief and disposition: By motion dated March 23, 1977 applicant requested to be relieved as counsel on the ground that the appeal was frivilous but motion was denied on the ground that Anders brief failed "to conform to Anders v. California, 386 U. S. 738 (1967) and by virtue of counsel's failure to comply with Rule 4(b) of the United States Court of Appeals for the Second Circuit".

Statement of the issue(s) presented by this motion:
Whether this appeal is frivilous

Brief statement of the facts *(with page references to the moving papers)*:
Defendant pleaded twice to the charge for which he was sentenced to two years for which the maximum is five. Upon being sentenced he appealed and counsel believes the appeal is frivolous. Page 1

Summary of the argument *(with page references to the moving papers)*:

Inasmuch as there are no arguable questions of law counsel requests that he be relieved as counsel. Page 2

12/12/77
Date

John T. Donovan
The name signed must be printed beneath
JOHN T. DONOVAN

For completion by the Clerk of Court

Motion Control Number

3

RULES of the UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT
supplementing
Federal Rules of Appellate Procedure

Sec. 27. Motions:

(a) Form of Notice of Motion and Supporting Papers for Motions and Opposition Statements.

(1) Notice of Motion: The moving party shall submit the Notice of Motion in the format approved by the court with such changes as the chief judge may from time to time direct.

(2) Supporting Papers for Motions and Opposition Statements:

(a) Affidavits should contain factual i 'ormation only. Affidavit containing legal argument will be treated as moranda of law.

(b) Memoranda of law shall not exceed ten typewritten double-spaced 8½" x 11" pages except by permission of the court.

(c) Copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(d) Exhibits attached should be only those necessary for the determination of the motion.

(3) Non-compliance Sanctions: If the moving party has not complied with this rule, the motion may be dismissed by the clerk without prejudice to renew upon proper papers. If application is promptly made, the action of the clerk may be reviewed by a single judge. If the responding party fails to comply with this rule, the court may refuse to hear that party at oral argument. The court may impose costs and an appropriate fine against either party for failure to comply with this rule.

77 - 1284
Docket No.

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

-vs-

THOMAS JAMES SMITH

NOTICE OF MOTION

JOHN T. DONOVAN
Attorney(s) for Petitioner
Office & Post Office Address & Telephone Number
330 Powers Building
Rochester, New York
14614

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

THE UNITED STATES OF AMERICA

-vs- AFFIDAVIT

THOMAS JAMES SMITH

STATE OF NEW YORK)
)ss
COUNTY OF MONROE)

JOHN T. DONOVAN, being duly sworn deposes and says that he is the court appointed counsel in the above entitled proceeding and makes this motion to be relieved as such counsel on the ground that the appeal herein is frivilous.

The May 1975 session of the Federal Grand Jury indicted defendant on two counts in violation of 18 U. S. C. Sec. 2312 and 2313 to which defendant pleaded guilty. Thereafter deponent was appointed counsel by Judge Harold P. Burke on March 17, 1977. Thereafter on April 11, 1977 upon motion of deponent the pleas were permitted to be withdrawn. Thereafter, defendant decided to plead to one count of the indictment and on June 1, 1977 was sentenced to two years imprisonment. he thereupon caused this appeal to be filed. No threats or promises were made to induce defendant to plead and the sentence imposed was not only legal but lenient. There are no arguable questions of law.

A prior application to be relieved was made by deponent but was denied on the ground that the Anders brief which was submitted did not conform to Anders v. California and for coun-

sel's failure to comply with Rule 4(b) of the United States Court of Appeals for the Second Circuit supplementing the Federal Rules of Appellate Procedure.

In an effort to correct the first objection counsel has read and re read said Anders case and submits another Anders brief herewith.

In an effort to correct the second objection counsel has forwarded on October 13, 1977 the forms required under Rule 4(b) to the defendant who is incarcerated at Federal Correction Institution at Sandstone, Minnesota with a request that they be filled out and returned so that the appeal could be processed. They have never been returned and the time to make this motion has nearly expired. Deponent can do no more.

WHEREFORE deponent requests that he be relieved as counsel.

John T. Dorsa

Sworn to before me this
13th day of December, 1977

William S. Zielinski
Notary Public

WILLIAM S. ZIELINSKI
NOTARY PUBLIC, State of N. Y., Monroe County
My Commission Expires March 30, 1979

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee)
City of Batavia)

USA vs. Thomas James Smith

77-1284

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 20th day of December ~~Briefs~~, 19 77 I mailed _____ copies of a printed ~~Briefs~~ in the above case, in a sealed, postpaid wrapper, to:

8 Copies to A. Daniel Fusaro, Clerk, U. S. Court of Appeals-2nd Circuit, New Federal Court House, Foley Square New York, N.Y. 10007

1 Copy to Gerald J. Houlihan Esq. U. S. Atty., 100 State St. Rochester, NY 14614

1 Copy to Thomas James Smith Esq., Federal Correctional Institute, Santone, Minnesota, 55072

at the First Class Post Office in Batavia, New York. The package was mailed at about 4:00 P. M. on said date at the request of:

John T. Donovan Esq. 330 Powers Bldg. Rochester, NY 14614

Leslie R. Johnson

Sworn to before me this
20th day of December, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 78